UT Neutral citation number [2023] UKUT 165 (IAC)

Ahmed (historical injustice explained)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 26 May 2023
Promulgated on 3 July 2023

Before

THE HONOURABLE MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE SHERIDAN

Between

Md Imtiaz Ahmed
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr. Malik KC and Mr. Fazli, instructed by Londonium Solicitors
For the Respondent: Ms. Ahmed, Senior Home Office Presenting Officer

1. *As is clear from the decision in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC), the phrase "historical injustice" does not connote some specific separate or freestanding legal doctrine but is rather simply a means of describing where, in some specific circumstances, the events of the past in relation to a particular individual's immigration history may need to be taken into account in weighing the public interest when striking the proportionality balance in an Article 8 case. In relation to the striking of the proportionality balance in cases of this kind we make the following general observations:*

    a. *If an appellant is unable to establish that there has been a wrongful operation by the respondent of her immigration functions there will not have been any historical injustice, as that term is used in Patel, justifying a reduction in the weight given to the public interest identified in section 117B(1) of the Nationality, Immigration and Asylum Act 2002. Although the possibility cannot be ruled out, an action (or omission) by the respondent falling short of*

a public law error is unlikely to constitute a wrongful operation by the respondent of her immigration functions.

b. *Where the respondent makes a decision that is in accordance with case law that is subsequently overturned there will not have been a wrongful operation by the respondent of her immigration functions if the decision is consistent with the case law at the time the decision was made.*

c. *In order to establish that there has been a historical injustice, it is not sufficient to identify a wrongful operation by the respondent of her immigration functions. An appellant must also show that he or she suffered as a result. An appellant will not have suffered as a result of wrongly being denied a right of appeal if he or she is unable to establish that there would have been an arguable prospect of succeeding in the appeal.*

d. *Where, absent good reason, an appellant could have challenged a public law error earlier or could have taken, but did not take, steps to mitigate the claimed prejudice, this will need to be taken into account when considering whether, and if so to what extent, the weight attached to public interest in the maintenance of effective immigration controls should be reduced. Blaming a legal advisor will not normally assist an appellant. See Mansur (immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 274 (IAC).*

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh who came to the UK as a student in August 2008. After several extensions, his leave to remain expired on 19 March 2016. He then remained in the UK without leave.

2. The appellant claims that removing him from the UK would breach article 8 ECHR. Amongst other things, he contends that the public interest in effective immigration controls is substantially reduced in his case because he suffered an injustice on 15 September 2016, when an application he made on 17 March 2016 under the Immigration (EEA) Regulations 2006 ("the EEA Regulations") for a residence card as an extended family member of an EEA national was refused without affording him an opportunity to appeal that decision to the First-tier Tribunal.

3. This argument was rejected by Judge of the First-tier Tribunal Peer ("the judge") who, in a decision dated 3 October 2022, dismissed the appellant's appeal that had been brought under section 82(1)(b) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). The appellant is now appealing against the judge's decision.

Background

4. After entering the UK as a student in August 2008 with leave until 30 September 2009, the appellant applied successfully to extend his leave on several occasions. His last period of leave, which was as a Tier 4 General student, was between 28 November 2013 and 19 March 2016.

5. On 17 March 2016 the appellant submitted an application for a residence card under the EEA Regulations, claiming to be an extended family member of an EEA national. In a decision dated 15 September 2016 ("the 2016 decision") the respondent rejected the application for multiple reasons. It was not accepted that the appellant was related as claimed to the EEA national, that he was dependent on the EEA national, or that the EEA national was a 'qualified person' . The respondent stated the following in respect of whether the appellant could appeal against the 2016 decision:

> "You do not have a right of appeal against this decision. Appeals under the EEA regulations can only be made against an EEA decision. An EEA decision does not include a refusal to issue a residence card/a registration certificate/an EEA permit to an extended family member. This position is in line with the Upper Tribunal's judgment in Shemsi Sala v the Secretary of State for the Home Department (IA/44409/2013)"

6. Despite being informed that he had no right of appeal, on 7 October 2016 the appellant lodged an appeal in the First-tier Tribunal against the 2016 decision. On 8 December 2016 his appeal was dismissed for want of jurisdiction on the basis that it had been held in *Sala* (EFMs: Right of Appeal) [2016] UKUT 411 (IAC); [2017] Imm AR 141 that there is no right of appeal against a decision by the respondent to not issue an extended family member a residence card.

7. The appellant then (on 19 December 2016) commenced judicial review proceedings in the Upper Tribunal. The appellant's application challenged the rationality of deciding he was not an extended family member, not the failure to acknowledge that he had a right of appeal. On 23 March 2017 permission was refused on the papers and on 17 May 2017 permission was refused following an oral hearing. The appellant then appealed to the Court of Appeal.

8. In November 2017, whilst the appellant's appeal in the Court of Appeal was pending, *Sala* was overturned by the Court of Appeal in *Khan v Secretary of State for the Home Department & Anor* [2017] EWCA Civ 1755; [2018] Imm AR 440. *Khan* made clear that extended family members have a right of appeal to the First-tier Tribunal.

9. On 17 April 2018, the appellant was refused permission to appeal by the Court of Appeal. There is no reference in the refusal decision to *Sala* being overturned several months earlier. When refusing permission, Sharp LJ stated:

> "The applicant failed to substantiate his claim to be a dependent relative of an EEA national by failing to submit evidence. Furthermore his immigration history was inconsistent with his claim to be a dependent relative…In the absence of any ground with any prospect of success, or any other compelling reason why the claim should be heard, permission to appeal is refused"

10. On 18 April 2018 the appellant applied for asylum. His application was refused and subsequent appeal dismissed.

11. He then submitted (on 13 June 2019) an application for leave on the basis of 10 years continuous lawful residence. This application was refused on 18 July 2019 with no right of appeal. The respondent agreed to reconsider her decision, and on 11 May 2021 the respondent made a further decision refusing the appellant's application, but this time with a right of appeal.

Decision of the First-tier Tribunal

12. As recorded in paragraph 41 of the decision, the issues in contention before the First-tier Tribunal were relatively narrow. The appellant did not contend that he could satisfy the Immigration Rules, either on the basis of 10 years continuous residence under paragraph 276B or on the basis of his private life under paragraph 276ADE(1). He also did not claim that he would face a risk of harm on return to Bangladesh. The focus of his argument was on the public interest in effective immigration controls, which he contended ought not to weigh significantly (or at all) against him. There were two strands to this argument.

13. The first strand was that although the appellant did not fall within paragraph 276B of the Immigration Rules, there was not a good reason to treat him differently to a person who did. The appellant argued that his application for a residence card, which was made before the expiry of his leave under the Immigration Rules, remains outstanding because the 2016 decision failed to include information about his appeal rights as required by the Immigration (Notices) Regulations 2003 ("the Notices Regulations") and therefore was invalid. He submitted that if his application had been made under the Immigration Rules he would have accrued 10 years of lawful residence as his leave as a Tier 4 student would, rather than expire on 19 March 2016, have been extended by operation of section 3C of the Immigration Act 1971 ("the 1971 Act"). The appellant's skeleton argument before the First-tier Tribunal stated that he fell short of paragraph 276B for only "a marginal and technical error" and his position "was not materially different" to a person who satisfied the conditions of paragraph 276B. He maintained that because of this the public interest in his removal was reduced.

14. The judge rejected this argument. She found (in paragraph 48) that the appellant was not in an analogous position to a person who had made an 'in-time' application under the Immigration Rules

because: (a) section 3C of the 1971 Act is not applicable where a person applies under EU law rather than the Immigration Rules; (b) establishing status as an extended family member under the EEA Regulations does not automatically carry a right to reside; and (c) as an extended family member the appellant would only have had status from the date a residence card was issued and therefore the period between the application and the residence card would be a period without either leave under the Immigration Rules or status under the EEA Regulations. These findings have not been challenged and therefore we will not consider this aspect of the decision further, other than to note that the judge's assessment of this issue was plainly consistent with the recent Upper Tribunal decision *Ali & Ors* (EU Law equivalence; §276B; s3C) [2022] UKUT 278 (IAC); [2022] Imm AR 1477.

15. The second strand of argument advanced in the First-tier Tribunal as to why significant weight should not attach to the public interest in effective immigration controls was that the appellant suffered a "historical injustice" by being deprived of an opportunity to appeal against the 2016 decision. The judge gave detailed reasons explaining why she rejected this argument. In summary, they are as follows:

    a. First, when the 2016 decision was made it was commonly understood, in the light of *Sala*, that an extended family member did not have a right of appeal; and it was not unreasonable for the respondent to act in accordance with that understanding.

    b. Second, based on the evidence submitted to the First-tier Tribunal – and having regard to what was said by Sharp LJ in the Court of Appeal (see paragraph 9 above) – the appellant's EEA appeal had no prospect of succeeding.

    c. Third, the case law did not establish that the 2016 decision should be treated as invalid and, in any event, the appellant had waived this objection by lodging a notice of appeal.

    d. Fourth, after the law on rights of appeal was clarified in *Khan,* the appellant could have (at any time until 31 December 2020 when, as a consequence of the UK's withdrawal from the EU, the opportunity to do so ceased) sought from the respondent a fresh decision with a right of appeal.

Grounds of Appeal

16. The appellant advanced four grounds of appeal.

17. Ground 1 argues that the judge erred by treating the 2016 decision as valid when it did not comply with the Notices Regulations. This is said to be inconsistent with *OI* (Notice of decision: time calculations) Nigeria [2006] UKAIT 42 and it is argued that the judge failed to engage with this decision.

18. Ground 2 argues that the judge failed to engage with the evidence before the First-tier Tribunal, or to give adequate reasons, in concluding that the appellant's chance of success in an appeal against the 2016 decision was negligible.

19. Ground 3 argues that the judge erred by stating that the First-tier Tribunal decision dismissing the appeal against the 2016 decision for want of jurisdiction was "correct at the time given the authority of the Upper Tribunal in *Sala*". The appellant submits that this is wrong because the fact that the decision was consistent with *Sala* did not make it correct given the subsequent confirmation in *Khan* that there was a right of appeal.

20. Ground 4 argues that the judge's assessment of proportionality under article 8 was made on the wrong premise because of the reasons given in the grounds 1-3.

Submissions

21. At the start of the hearing we drew to the attention of Mr Malik and Ms Ahmed a recent authority *Marepally v Secretary of State for the Home Department* [2022] EWCA Civ 855; [2022] Imm AR 1341, where the Court of Appeal did not accept that a decision refusing leave under the Immigration

Rules was invalid because of a failure to comply with the Notices Regulations. *Marepally* is discussed in more detail below in paragraphs 40-44.

22. Mr Malik KC submitted that *Marepally* is distinguishable because (a) it was concerned with whether leave had been extended under section 3C of the 1971 Act, which was not being argued in this case; (b) in *Marepally* it had been conceded that Mr Marepally could not have succeeded in an appeal whereas in this case the appellant maintained (and continues to maintain) that he has a viable appeal against the 2016 decision; and (c) Mr Marepally's purpose, in arguing that the decision was invalid, was to benefit from an extension of leave as a result of there not being a valid decision whilst the appellant, in contrast, claims to have suffered an injustice because he has been unable to challenge the substance of the 2016 decision. Mr Malik KC also highlighted that the conclusion in *Marepally* is qualified, in that it is not stated that a defective notice will necessarily be either effective or ineffective. He relied on the wording in paragraph 44 of *Marepally* which we have set out below in paragraph 41.

23. With respect to ground 1, Mr Malik KC submitted that the essential point in *OI*, which the judge failed to address, is that the failure to comply with the Notices Regulations in the 2016 decision meant that there had not been a lawful decision and the appellant consequently suffered an injustice because, in the absence of a lawful decision, he was unable to exercise the right of appeal to which he is entitled.

24. In response to being asked why the appellant did not amend his judicial review grounds once *Sala* was overturned in order to raise the appeal rights issue, Mr Malik KC stated that the appellant's solicitors were unaware of these developments in the law.

25. With respect to ground 2, Mr Malik KC argued that the judge's finding that the appellant's prospect of succeeding in an appeal against the 2016 decision was negligible was made without engaging with the evidence indicating the contrary.

26. With respect to ground 3, Mr Malik KC repeated the submission in the grounds, that the judge was wrong to suggest that the Court of Appeal made new law when *Sala* was overturned.

27. Mr Malik KC did not make any submissions in respect of ground 4, which he acknowledged does not make a submission that is distinct from the other grounds.

28. Ms Ahmed made a range of arguments, addressing, in addition to the grounds of appeal, the relevance of *Marepally* and whether there was any basis for the appellant to claim to have suffered from a historical injustice. Her key points include:

    a. The principles identified in *Marepally* are applicable to this case.

    b. It was not a wrongful operation by the respondent of her immigration function to act in accordance with the law as understood at the time, for the reasons given in *Hysaj* (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC); [2020] Imm AR 1044. *Hysaj* is discussed below in paragraph 37.

    c. The appellant cannot rely on his solicitor's ignorance of the law as a justification for not raising the *Sala* issue in the judicial review proceedings.

    d. The appellant's argument that he suffered an injustice because his appeal rights were not set out in the 2016 decision is undermined by the fact that he lodged an appeal in any event.

    e. *OI* is distinguishable because it is concerned with defective service rather than a failure to notify a person of appeal rights and *OI* recognised that an appellant can (as occurred in this case) waive a requirement of the Notices Regulations by submitting a notice of appeal.

Analysis

29. Before addressing the specific arguments raised in the grounds, we will consider the issue that underpins them: whether the appellant can be said to have suffered from a historical injustice as that term is described in *Patel* (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC); [2021] Imm AR 355.

30. When considering whether removal is justified under article 8(2) ECHR, judges are required by section 117A(2)(a) of the 2002 Act to have regard to the considerations listed in section 117B. The first of these considerations (117B(1)) is that the maintenance of effective immigration controls is in the public interest. The weight to be given to this public interest is not fixed and, as is made clear in *Patel*, may, in some instances, be reduced where an appellant has:

> "suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions".

31. *Patel* concerned an appellant who claimed to have suffered an injustice because her employer had refused to support an extension of her leave as a highly skilled worker. The Presidential Panel rejected her claim to have suffered an injustice that was relevant to the public interest in effective immigration controls for the (obvious) reason that the responsible party for the (perceived) injustice was her employer, not the respondent.

32. The Panel in *Patel* undertook a detailed consideration of how an "injustice" might effect the public interest in effective immigration controls. It drew a distinction between "historic injustice" and "historical injustice". The category of "historic injustice" is limited to a very limited number of specific cases where the UK government has belatedly recognised that a particular class of person has been wrongly treated. Clearly, this has no relevance to this appeal. "Historical injustice", as understood and explained in the case of *Patel* is relied upon by the appellant. The headnote to *Patel* explains historical injustice in these terms:

> B. Historical injustice
>
> (3) Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category.

33. It is clear that in the decision in *Patel* the Upper Tribunal was not seeking to identify a separate legal doctrine or principle of "historical injustice" which entitles an appellant to succeed without more. The discussion in that case, and in fact in all the cases, is rooted in the specific facts of those cases. The consideration of this issue arises specifically in the context of the appraisal of the proportionality assessment, and is directly related to the weighing of the public interest in the maintenance of immigration control. These cases are, therefore, to be anchored within the legal framework of Article 8, and Article 8(2) in particular. As the Upper Tribunal made clear in paragraph 48 of its decision, "[a]lthough labels can sometimes be helpful, they can also obscure the true issues in play". There is danger seeking to rely upon arguments described as invoking "historical injustice" as if it were some kind of free-standing principle upon which an appeal could be launched without a careful examination of the merits of the appellant's proportionality case. It is an adjectival description rather than a phrase connoting any kind of substantive right. Just because there may have been some misstep, or something may have gone awry earlier in a person's immigration history, does not mean that this will always provide a basis for relief in respect of a subsequent decision. The key question will be whether some earlier feature of the factual background is relevant to the proportionality balance arising under Article 8. That said, there are two features of the description of historical injustice in *Patel* that are important to highlight and which provide useful guidance as to when the earlier facts of a person's case will be relevant to the proportionality balance.

    a. First, there must have been a wrongful operation of immigration functions. The examples in the headnote (and discussed in paragraphs 42-48) of *Patel* are all instances of well established public law errors.

b. Second, the appellant must have suffered as a result of the "wrongful operation"; i.e. there must be a causal connection between the "wrongful operation" by the respondent of her immigration functions and the prejudice the appellant claims to have suffered.

34. In this case, the historical injustice which is said to have arisen and which is relied upon by the appellant is that the respondent failed to comply with the Notices Regulations in the 2016 decision because she did not provide information about the appellant's right of appeal.

35. At the time the 2016 decision was made there was an authority in the Upper Tribunal (*Sala*) stating that there was not a right of appeal. The 2016 decision was consistent with this authority. Although with hindsight we know that the respondent was wrong to state that there was not a right of appeal, on the basis of the case law at the time the decision was made she could not reasonably have said anything else.

36. The question of whether a historical injustice arises where the respondent acts consistently with case law that is subsequently found to be wrong was considered in *Hysaj*. *Hysaj* was decided several months before *Patel*, which no doubt explains why, even though it was decided by a similar Presidential Panel, the terminology adopted in Patel ("historical injustice" and "wrongful operation of immigration functions") was not used. However, the approach to issues of this kind in *Hysaj* is entirely consistent with *Patel*.

37. *Hysaj* concerned an individual who, in 2012, was informed that his grant of his citizenship was a nullity. Mr Hysaj challenged the nullity decision and was ultimately successful in the Supreme Court: *Hysaj & Ors, R (on the application of) v Secretary of State for the Home Department* [2017] UKSC 82; [2018] Imm AR 699. The respondent withdrew the decision to treat Mr Hysaj's citizenship as a nullity and instead issued a decision (in 2018) depriving him of his citizenship under section 40(3) of the British Nationality Act 1981. One of the arguments advanced on behalf of Mr Hysaj was that since the nullity decision was made because of a mis-application of the law, the substantial delay that ensued as a result diminished the public interest in depriving him of citizenship. The Panel rejected this argument, finding that the respondent was entitled to act in accordance with the state of the law known to her even if subsequently it was found that the state of legal knowledge at that time was wrong. In paragraph 61 the Panel stated:

> The starting point in any consideration undertaken by the respondent as to whether to deprive the appellant of British citizenship must be made by reference to the rules and policy in force at the time the decision was taken, and such rules and policy will abide with relevant precedent, as understood. The respondent was entitled to rely upon the then favourable judgment in *Kadria* from which permission to appeal to the Court of Appeal had been subsequently refused at an oral hearing, and indeed did so rely before both the High Court and the Court of Appeal. Though *Akhtar* and subsequent Court of Appeal judgments that relied upon it cannot, with the benefit of hindsight post- the Supreme Court judgment in *Hysaj*, be considered to have finally and definitively settled the law the respondent and her legal advisors were entitled to observe the application of the doctrine of precedent. The respondent needs to have means of assessing the legality of her actions at a particular time, in order to know what her legal duty is. Rule of law values indicate that the respondent should be entitled to take advice and act in light of the circumstances known to her, and the state of the law, as then known.

38. In the light of *Patel* and *Hysaj*, it is clear that the appellant's historical injustice argument falls at the first hurdle: the failure to notify the appellant of a right of appeal in the 2016 decision did not amount to a wrongful operation by the respondent of her immigration functions because the respondent acted consistently with the state of the law as then understood.

39. This is sufficient to dispose of the appellant's historical injustice argument. However, for completeness, we have gone on to consider whether the appellant would have had a viable historical injustice argument if (contrary to our findings above) there had been a wrongful operation of immigration functions. We are satisfied that he would not, because even if there had been a wrongful operation of immigration functions, the evidence before the First-tier Tribunal was, on any legitimate view, insufficient to establish that he suffered as a result.

40. The need for an appellant to establish that he suffered as a result of the wrongful operation of immigration functions - and not just that there was a wrongful function - is clear not only from *Patel* (where the phrase "suffered as a result" is used), but also from the recent Court of Appeal judgment *Marepally. Marepally* concerned an appellant who was sent a notice of decision by the respondent refusing his application for leave under the Immigration Rules. The decision failed to inform Mr Marepally of his right of appeal. It was common ground that this was a mistake, as under the law at that time (both as it was and as it was commonly understood) the appellant had a right of appeal. Mr Marepally argued that because the notice of decision failed to notify him of his right of appeal as required by the Notices Regulations his application had not been determined and by operation of section 3C of the 1971 Act his existing leave to remain continued unless or until a decision was made in which he was informed of his right of appeal. Mr Marepally contended that the consequence of this was that he had accrued 10 years of continuous lawful residence and thereby was entitled to indefinite leave to remain under paragraph 276B of the Immigration Rules.

41. Lewis LJ rejected this argument. He found in paragraph 44 that:

> Failure to notify the person of his right of appeal may be a good reason for extending the time for appealing under rule 4(3) of the Rules. Further, if a notice is quashed in a claim for judicial review, then there will be no notice of a decision in existence and the respondent may have to send a fresh notice of the decision and the time for appealing against the decision may begin from that date. If the notice is not quashed, however, it will continue to exist and may continue to have legal effect. The fact that a notice is deficient and does not give all of the relevant information does not, therefore, mean that the notice is necessarily, and for all time, legally ineffective.

42. He observed that whilst a court might, in judicial review proceedings, quash a notice that is defective because of failure to include appeal rights, in some circumstances it may decide to not do so. In paragraph 47 he stated, by way of example, that:

> A court may decline to quash a notice of decision if granting such an order would, for example, serve no practical purpose or where no injustice has in fact been suffered.

43. Lewis LJ also referred with approval to a further example of where a court may not regard a notice as invalid or where it may exercise discretion to decline to quash a notice of decision, that was given by Sullivan at paragraph 42 of *E1/(OS Russia) v Secretary of State for the Home Department* [2012] EWCA Civ 357:

> The Court's response to such invalidity would normally be to quash the notice, unless it was satisfied that there had been substantial compliance with the requirement: eg because the Appellant had been made aware by other correspondence from the Respondent that he did, in fact, have an in-country right of appeal, because the First-tier Tribunal had accepted an in-country appeal from the Appellant, or because he had been allowed to present his appeal in the UK having been permitted to re-enter the country to do so.

44. One of the arguments advanced in *Marepally* was that Mr Marepally suffered an historical injustice. Lewis LJ addressed this argument in paragraphs 52 and 53, stating:

> …The appellant put his case before the First-tier Tribunal on the basis that he had suffered "an historic injustice" because he was not informed of his right of appeal. The appellant has not, however, suffered any injustice. He is not now seeking to appeal the substantive decision refusing Tier 5 leave. He accepts that the refusal of Tier 5 leave was correct. He did, indeed, challenge that substantive decision by way of judicial review but the claim failed. The appellant is not seeking to rectify any injustice he suffered by not being given the opportunity of appealing against the refusal of Tier 5 leave. Rather, he is seeking to benefit from that the fact that he was not told about his right of appeal in 2017 as a means of trying to keep any previous leave to remain in existence in order to accumulate further periods of lawful residence so he could satisfy the requirement of 10 years' continuous lawful residence and qualify for indefinite leave to remain under paragraph 276B of the Immigration Rules. The fact that he is unable to do so does not amount to an injustice, historic or otherwise.
>
> In the present context, therefore, the fact that the Upper Tribunal erred in considering that in 2015 the appellant waived any defect in the notice of decision is immaterial. The First-tier Tribunal was not obliged to determine whether or not the notice sent in May 2017 was legally defective. That notice had

not been quashed and the First-tier Tribunal was not hearing an appeal against that decision. It was satisfied that the appellant had suffered no historic injustice as a result of any defect in the notice and there is no possible ground for considering that its decision on that matter was wrong. There is no purpose, therefore, in remitting this appeal to the Upper Tribunal. It would have to dismiss the appellant's appeal against the First-Tribunal's decision.

45. When refusing the appellant permission to appeal against the Upper Tribunal's refusal to grant him permission to bring judicial review proceedings against the 2016 decision, Sharp LJ stated that the appellant had failed to substantiate his claim to be a dependent relative of an EEA national and had an immigration history that was inconsistent with his claim to be a dependent relative. In the light of Sharp LJ's decision, the appellant could have been in no doubt of the need to provide at least some evidence in these proceedings to substantiate his claim to have been a dependent relative of an EEA national. However, despite the appellant submitting to the First-tier Tribunal a bundle of over 1000 pages, Mr Malik KC was unable to identify within that bundle any evidence corroborating his claim to have been a dependent relative of an EEA national. Mr Malik KC stated that reliance could be placed on paragraphs 3 and 33 of the appellant's first witness statement and paragraph B.3 of his second witness statement. In paragraph 33 of the first statement the appellant states that his uncle financially helped him in completing his further study in the UK. Paragraph 3 of the first statement states that the appellant applied for a residence card and feels that the application was decided incorrectly. In paragraph B.3 of his second statement the appellant states that if he had been granted a right of appeal he would have presented his case. The evidence in these paragraphs does not come close, even taken at its highest, to establishing that the appellant had an arguable prospect of succeeding in an appeal against the 2016 decision. Accordingly, even if not notifying the appellant in the 2016 decision of his right of appeal constituted a wrongful operation by the respondent of her immigration functions, the appellant's historical injustice argument could not, in any event, have succeeded because he was unable to establish that he had suffered as a result of the wrongful operation of immigration functions.

46. Even where an appellant is able to establish both that there has been a wrongful operation of immigration functions and that he has suffered as result, it does not necessarily follow that there should be a significant (or any) reduction in the weight given to the public interest in effective immigration controls. In this case, had we accepted that the appellant suffered as a result of a wrongful operation of immigration functions, we would still not have reduced the weight given to the public interest the maintenance of effective immigration controls, for the following two reasons.

47. The first reason concerns the appellant's judicial review proceedings challenging the 2016 decision. It is understandable that, when the judicial review claim was commenced, the appellant did not raise as an issue the failure to notify him of an appeal right. Indeed, there was no basis for him to do so given the case law at the time as well as that his appeal to the First-tier Tribunal had been refused for want of jurisdiction. However, circumstances changed dramatically in November 2017 when *Sala* was overturned. From that point onwards, the appellant had an arguable case that the 2016 decision should be quashed so that a decision could be made giving him a right of appeal. In November 2017 the appellant's appeal against refusal of permission by the Upper Tribunal was pending in the Court of Appeal and the appellant clearly could have, at that time, applied to amend the grounds of appeal to address the *Sala* issue. In our view, his failure to do so undermines his argument that the public interest in effective immigration controls should be reduced.

48. Mr Malik KC's explanation for the appellant not raising the issue of appeal rights in the judicial review proceedings was that between the *Khan* judgment in November 2017 and Sharp LJ's decision in April 2018 the appellant's solicitors were not aware that *Sala* had been overturned. We are not persuaded that this assists the appellant in the light of what is said in *Mansur* (immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 274 (IAC); [2018] Imm AR 1436 about a person who takes advice from an immigration adviser normally having to live with the consequences.

49. The second reason why we would not have reduced the weight attached to the public interest in effective immigration controls is that the appellant had an opportunity to avoid the claimed prejudice which he did not take. As observed by the judge, following *Khan* and up until 31 December 2020 (when, as a consequence of the UK's withdrawal from the EU, this ceased to be an option) the

appellant could have approached the respondent to obtain a decision refusing his application for a residence card with a right of appeal. The fact that the appellant did not do this, and instead sought to rely on the invalidity of the 2016 decision as a way to establish that he was in the equivalent position of person whose leave was extended by operation of section 3C of the 1971 Act (which is how his case was previously framed), significantly undermines his argument that the public interest is reduced.

50. Returning to the theme set out above, as is clear from the decision in *Patel,* the phrase "historical injustice" does not connote some specific separate or freestanding legal doctrine but is rather simply a means of describing where, in some specific circumstances, the events of the past in relation to a particular individual's immigration history may need to be taken into account in weighing the public interest when striking the proportionality balance in an Article 8 case. Drawing together our findings in relation to the striking of the proportionality balance in cases of this kind we make the following general observations:

    a. If an appellant is unable to establish that there has been a wrongful operation by the respondent of her immigration functions there will not have been any historical injustice, as that term is used in *Patel*, justifying a reduction in the weight given to the public interest identified in section 117B(1) of the 2002 Act. Although the possibility cannot be ruled out, an action (or omission) by the respondent falling short of a public law error is unlikely to constitute a wrongful operation by the respondent of her immigration functions.

    b. Where the respondent makes a decision that is in accordance with case law that is subsequently overturned there will not have been a wrongful operation by the respondent of her immigration functions if the decision is consistent with the case law at the time the decision was made.

    c. In order to establish that there has been a historical injustice, it is not sufficient to identify a wrongful operation by the respondent of her immigration functions. An appellant must also show that he or she suffered as a result. An appellant will not have suffered as a result of wrongly being denied a right of appeal if he or she is unable to establish that there would have been an arguable prospect of succeeding in the appeal.

    d. Where, absent good reason, an appellant could have challenged a public law error earlier or could have taken, but did not take, steps to mitigate the claimed prejudice, this will need to be taken into account when considering whether, and if so to what extent, the weight attached to public interest in the maintenance of effective immigration controls should be reduced. Blaming a legal advisor will not normally assist an appellant. See *Mansur.*

51. We now turn to consider the grounds of appeal.

52. Ground 1 submits that it was wrong, in the light of *OI,* to treat the 2016 decision as valid. We are not persuaded by this argument for several reasons. First, there was no need for the judge to follow *OI* since it concerned a different issue. In *OI* the respondent served a notice of decision using a method that was not in accordance with the Notices Regulations. There was no dispute that the respondent had made a mistake and not complied with the Notices Regulations. In contrast, the respondent in this case, based on the state of knowledge of the law at the time the 2016 decision was made, acted consistently with the Notices Regulations; and it is only with hindsight that it can be said that the appellant was not provided with the right information about appealing. As explained in *Hysaj* and discussed above, the respondent was entitled to act, and cannot be faulted for acting, in accordance with the state of the law as then known.

53. Second, as is clear from paragraphs 52 – 53 of *Marepally*, the judge did not need to determine whether or not the 2016 decision was valid in order to decide whether there had been a historical injustice. Establishing that the 2016 decision was invalid was an important component of the appellant's argument, as advanced in the First-tier Tribunal, that he should be treated equivalently to a person whose leave had been extended under section 3C of the 1971 Act. This is because, following an in-time application under the Immigration Rules, leave will continue under section 3C until a decision is made. If the 2016 decision was invalid then, following this logic, the appellant's previous leave as a

Tier 4 (General) Student would continue (and, in fact, be continuing) to run. However, Mr Malik KC made clear that the appellant was not arguing that the judge erred in rejecting the appellant's 3C equivalence argument; his argument was that there had been a historical injustice because the appellant lost the opportunity to appeal against the 2016 decision. The relevant question, when determining whether the 2016 decision gave rise to a historical injustice, was whether there had been a wrongful operation of immigration functions by the respondent, not whether the 2016 decision was valid.

54. Third, although in *OI* it was found that if a notice is not served in accordance with the Notice Regulations it has not been lawfully served, it was also found that an appellant may waive the requirement of the Notices Regulations by submitting a notice of appeal. In this case, as observed by Ms Ahmed, the appellant did submit a notice of appeal.

55. Ground 2 argues that the judge's finding that the appellant had a negligible prospect of succeeding in an appeal against the 2016 decision was not adequately reasoned and was made without engaging with the evidence that was before the First-tier Tribunal. As discussed above in paragraph 45, there was an almost complete absence of evidence before the First-tier Tribunal relevant to the question of whether the appellant could succeed in such an appeal. We are therefore not persuaded that there is any merit to this ground.

56. Ground 3 argues that the judge erred by finding that the First-tier Tribunal decision in December 2016 rejecting the appellant's EEA appeal for want of jurisdiction "was correct at the time given the authority of the Upper Tribunal in *Sala*". The grounds state that the Court of Appeal judgment overturning *Sala* did not make new law but simply stated what the law has always been. There is no merit to this ground because it is clear from paragraphs 53 and 54 of the decision, where the judge referred to "the previous understanding" of the law, that the judge appreciated that it was the understanding of the law, not the law itself, that changed following *Khan*. In any event, even though *Sala* was subsequently overturned, the First-tier Tribunal considering the appellant's appeal in December 2016 was still bound by *Sala* as a matter of precedent. See paragraph 43 of *Berdica* (Deprivation of citizenship: consideration) [2022] UKUT 00276 (IAC). It was therefore not inaccurate to state that the First-tier Tribunal acted correctly by following *Sala*.

Notice of Decision

57. The decision of the First-tier Tribunal did not involve the making of an error of law and stands. The appeal is dismissed.

D. Sheridan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 June 2023